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IN THE

**Supreme Court of the United States**

Supreme Court, U. S.

**FILED**

**JUN 16 1977**

WILLIAM R. QUINLAN, JR., CLERK

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OCTOBER TERM, 1976

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**No. 76-1171**

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**JAMES Y. CARTER**, Public Vehicle License  
Commissioner of the City of Chicago,  
*Petitioner,*

vs.

**LUTHER MILLER**, on his own behalf and on  
behalf of all others similarly situated,  
*Respondent.*

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On Writ Of Certiorari To The United States  
Court Of Appeals For The Seventh Circuit

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**BRIEF OF PETITIONER**

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PETITION FOR CERTIORARI FILED FEBRUARY 24, 1977  
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## TABLE OF CONTENTS

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	PAGE
OPINIONS BELOW .....	1
JURISDICTION .....	2
QUESTION PRESENTED .....	2
CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED .....	3
STATEMENT OF THE CASE .....	5
The Complaint .....	5
The Decision of the District Court .....	5
The Opinion of the Court of Appeals .....	6
SUMMARY OF ARGUMENT .....	7
ARGUMENT:	
Prefatory Note .....	10
I.	
Denial Of A Hearing To Applicants Does Not Result In A Denial Of Equal Protection .....	10
II.	
The Ordinance Does Not Deny Due Process .....	16
CONCLUSION .....	27

## LIST OF AUTHORITIES CITED

### *Cases*

Bell v. Burson, 402 U.S. 535 (1971) .....	11, 22
Bishop v. Wood, 426 U.S. 341 (1976) .....	11
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) .....	24

Dandridge v. Williams, 397 U.S. 471 (1970) .....	16
DeVeau v. Braisted, 363 U.S. 144 (1960) .....	20, 21, 25
Dixon v. Love, 45 U.S.L.W. 4447 (May 16, 1977) .....	15
Freitag v. Carter, 489 F.2d 1377 (7th Cir. 1973) .....	22
Marshall v. United States, 414 U.S. 417 (1974) .....	14, 15, 26
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) .....	13, 14, 26
McGinnis v. Royster, 410 U.S. 263 (1973) .....	26
Perry v. Sindermann, 408 U.S. 593 (1972) .....	11
Roth v. Board of Regents, 408 U.S. 564 (1972) .....	11, 18
Schwartz v. Board of Bar Examiners, 353 U.S. 232 (1957) .....	21, 22
Stanley v. Illinois, 405 U.S. 645 (1972) .....	23
Turner v. Department of Employment Security, 423 U.S. 44 (1975) .....	24
United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) .....	23, 24
United States Department of Agriculture v. Murry, 413 U.S. 508 (1973) .....	23
Vlandis v. Kline, 412 U.S. 441 (1973) .....	23
Weinberger v. Salft, 422 U.S. 749 (1975) .....	19, 20
Williamson v. Lee Optical Co., 348 U.S. 483 (1955) ....	19, 20

*Constitutional Provisions, Statutes  
and Ordinances*

Constitution of the United States, Amendment XIV .....	3
United States Code, Title 42, § 1983 .....	3
Municipal Code of the City of Chicago, Chapter 28.1-2 .....	3
Chapter 28.1-3 .....	4
Chapter 28.1-10 .....	4

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## BRIEF OF PETITIONER

### OPINIONS BELOW

The memorandum opinion and order of the district court in favor of defendant-petitioner, entered January 17, 1975, are unreported. They are reproduced at pages 15-16 of the Appendix.

The per curiam opinion of the Court of Appeals, filed January 4, 1977, reversing the judgment of the district court, is reported at 547 F.2d 1314 (1977). It is reproduced at pages 18-26 of the Appendix. The concurring opinion of Judge Campbell is reproduced at pages 26-45 of the Appendix.

## JURISDICTION

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The judgment of the Court of Appeals was entered on January 4, 1977.

A motion for stay of mandate pending application to this Court for a writ of certiorari was filed on January 24, 1977. On January 25, 1977, an order was entered by the Court of Appeals staying the mandate until February 24, 1977 (Appendix, p. 46).

The jurisdiction of this Court rests on U.S. Code Title 28, § 1254(1).

Defendant Carter's Petition for Writ of Certiorari was filed in this Court on February 24, 1977 and an Order granting that Petition was entered on April 18, 1977.

## QUESTION PRESENTED

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Is an ordinance which conclusively denies issuance of a public chauffeur's license to any applicant convicted of certain armed felonies violative of the Equal Protection Clause because revocation of a present licensee's previously granted license is discretionary after a hearing rather than mandatory?

## CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

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### Constitution of the United States

#### Amendment XIV:

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### United States Code

#### Title 42, § 1983:

Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

### Municipal Code of the City of Chicago

#### Chapter 28.1-2:

It is unlawful for any person to drive a public passenger vehicle on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city without first having obtained a license as a public chauffeur.



Chapter 28.1-3:

Applications for public chauffeur licenses shall be made in writing to the commissioner upon forms provided by him therefor. . . .

. . . .  
No such license shall be issued to any person at any time after conviction of a crime involving the use of a deadly weapon . . .

Chapter 28.1-10:

. . . .  
If any person has obtained a public chauffeur's license by application in which any material fact was omitted or stated falsely, or if any chauffeur shall become unfit to operate a public passenger vehicle on account of any infirmity of body or mind or because of addiction to the use of drugs or intoxicating liquors, or shall violate any criminal law which, if convicted for such offense, would disqualify any applicant for a chauffeur's license . . . the commissioner may recommend to the mayor that his license shall be revoked and the mayor, in his discretion, may revoke such license.

STATEMENT OF THE CASE

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The Complaint

In his amended complaint (App. p. 3) the respondent sought injunctive and declaratory relief from Chapter 28.1-3 of the Municipal Code of the City of Chicago which provides that no public chauffeur's license (taxi driver's license) "shall be issued to any person at any time after conviction of a crime involving the use of a deadly weapon . . . ." Respondent alleged that he had been convicted of armed robbery, had served a sentence in the Illinois penitentiary and completed parole. He alleged that pursuant to the ordinance and based upon his criminal conviction he had been denied a public chauffeur's license. This denial, he alleged, was in violation of his rights under the Fifth, Eighth and Fourteenth Amendments of the Constitution of the United States.

The Decision of the District Court

In its memorandum opinion and order (App. p. 15) the District Court dismissed respondent's complaint. The court found that the ordinance did not violate the Eighth Amendment because punishment of offenders was not its purpose. The court found no denial of equal protection because the classification of persons convicted of a crime involving use of a deadly weapon is rationally related to the protection of the users of public vehicles. Finally the court declared that an irrebuttable presumption barring a specified class of persons from a certain occupation is not a denial of due process where, as in this instance, there is a rational relationship between the classification and goals sought to be achieved.

### The Opinion of the Court of Appeals

The judgment of the Court of Appeals for the Seventh Circuit (App. p. 18) reversed and remanded the decision of the district court. The Court of Appeals concluded that the ordinance which conclusively denies a public chauffeur's license to any applicant convicted of an armed felony resulted in a denial of equal protection because another ordinance provides that a present licensee's license is not automatically revoked as a consequence of such an offense, but instead may be revoked in the discretion of the Mayor. The court did not hold that applicants for the license are entitled under the Due Process Clause to a hearing; nor did it consider the differing interests of present licensees and new applicants as basis for differing procedural treatment. Rather, the court assumed that the class in issue was that of ex-offenders and held that the mandatory denial of a license to newly applying offenders constituted a denial of equal protection as a consequence of the fact that revocation of licenses of offenders already licensed is discretionary after a hearing.

The Court of Appeals declined to rule on Respondent's due process arguments. A concurring opinion of District Judge Campbell (App. p. 26), however, considered Respondent's contention that the ordinance constituted an impermissible irrebuttable presumption and concluded that the ordinance should be held violative of the Due Process Clause.

### SUMMARY OF ARGUMENT

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The Municipal Code of the City of Chicago provides that any applicant who has been convicted of a crime involving the use of a dangerous weapon will be denied a taxi driver's license. However, an incumbent licensee who commits such an offense may not have his license revoked except after a hearing at which he may submit argument or evidence to demonstrate continuing fitness for the license.

This disparity reflects an acknowledgement of two factors which differentiate the circumstances of applicants and licensees. First, a current licensee has a career at stake which is terminated by the revocation of his license. For this reason the City has recognized that his interest resembles that of a governmental employee who has a property interest in his job which may not be extinguished except after a hearing. An applicant, on the other hand, has nothing analogous to a property interest in the employment for which he is seeking to qualify.

Second, an already licensed driver has created a record during his employment which is the most reliable indicator of his current and future fitness. An applicant, however, has not demonstrated in practice whether he is an appropriate candidate for the license and in his case the commissioner, if he were to provide a hearing, would likely be compelled to rely upon probation reports, dissimilar employment experiences or psychological evaluations. For these reasons the commissioner can more confidently rely upon a hearing to yield reliable evidence on the issue of fitness of licensees than could be done in the case of applicants.



Because a taxi driver has a high degree of control over his passenger who is unavoidably uninformed in his selection of drivers, the licensing authority has a substantial responsibility in protecting the public from criminal actions by taxi operators. This responsibility is met, among other ways, by the disqualification of those who have been convicted of crimes involving the use of a deadly weapon. Of course the public might be best protected by a categorical exclusion of all such persons from the operation of taxis. However, the City Council of Chicago has recognized the presence of countervailing considerations in the case of career drivers which make a total exclusion inappropriate and unnecessary. Those considerations are reflected in the hearing provisions of the licensing ordinance.

The interests of applicants in the license they seek cannot be identified as within any class which this Court has termed fundamental for equal protection consideration. Nor has criminal conviction, long recognized as an appropriate criterion in employment selection, ever been held a suspect classification. For these reasons the ordinance upon which this case focuses should be measured by the traditional rational basis equal protection standard. It is submitted that the ordinance meets that standard.

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The per curiam decision of the Court of Appeals, though stated in equal protection terms, is heavily reliant upon due process considerations. The concurring opinion of Judge Campbell concludes that convicted license applicants are denied due process as a result of the use of an irrebuttable presumption of unfitness. The per curiam opinion's emphases upon the "automatic" denial of licenses to applicants without "individualized

hearings" indicates that the full court also was strongly influenced by a due process irrebuttable presumption analysis.

However, the safety of taxi passengers is a concern of such gravity and the difficulty of making individualized findings of fitness in the case of convicted applicants is so great that the irrebuttable presumption test should not be applied. Rather, the ordinance should be upheld as a rational legislative classification appropriate for the achievement of ends which could not well be served through individualized hearings.

However, even if a more rigorous, irrebuttable presumption analysis is undertaken the limited interest of convicted applicants is given adequate due process protection under the ordinance. Statutory measures which have failed an irrebuttable presumption test have done so either because the statutorily specified fact has itself been established in a manner which lacked adequate procedural safeguards or because the statutorily specified fact did not rationally or universally imply the presumed ultimate fact. The ordinance is not subject to either of these objections. The guilt of the convicted felon is established beyond any conceivable due process objection by a criminal trial. And the rationality of an inference of unfitness for cab driving based upon the commission of an armed felony cannot be questioned. Finally, any objection to the inference of present unfitness based upon a possibly long-past conviction is subject to this Court's repeated holding that such limitations are inherently legislative decisions. Thus the ordinance, even if measured against an irrebuttable presumption standard, does not deny due process to convicted applicants.

## ARGUMENT

### Prefatory Note

The ordinance subjects both applicants and incumbent licensees to a denial of their cab drivers' licenses for conviction of an armed felony. The distinction made between the two classes is that an applicant is automatically disqualified by a conviction but an incumbent licensee may have a hearing after which his license may be revoked in the discretion of the Mayor. Thus the difference in treatment accorded the two classes is entirely procedural. The opinion of the Court of Appeals purports to dispose of the case exclusively on an equal protection analysis and avoids directly confronting the due process issues. However because the Court's opinion appears to borrow from the due process analyses spelled out in the concurring opinion and for the convenience of this Court, if it should conclude that the case cannot be decided exclusively upon equal protection grounds, Petitioner in part II of this Brief has also addressed the due process issues. Petitioner submits that the ordinance is constitutional whether measured by equal protection standards or due process criteria.

#### I.

### DENIAL OF A HEARING TO APPLICANTS DOES NOT RESULT IN A DENIAL OF EQUAL PROTECTION.

In stating its decision in this case the Court of Appeals declared:

An applicant for a license who has committed one of the described felonies and a licensee who has done the same are similarly situated, and no justification exists for automatically disqualifying one and not the other. [App. p. 21]

The premise that applicants and licensees are similarly situated is basic to the Court's conclusion that applicants are denied equal protection by Chicago's ordinance. It is Petitioner's contention that that premise is fundamentally erroneous.

This Court has held in a variety of contexts that governments create property rights and entitlements, not otherwise extant, through rules and understandings and that those rights, having been so created, must be accorded due process protections. In *Perry v. Sindermann*, 408 U.S. 593 (1972), it was held that if a state college professor could demonstrate that his governmental employer had, through rules and understandings, justified his claim of entitlement to continued employment then he was entitled to a hearing before his employment could be discontinued. On the other hand in *Roth v. Board of Regents*, 408 U.S. 564 (1972), it was held that a college professor who could point to neither contractual nor statutory assurances of continued employment had no property interest in his position and could be summarily denied retention without a hearing.

This rationale has found consistent application in governmental employment cases and was recently reiterated in *Bishop v. Wood*, 426 U.S. 341 (1976). Bishop, a municipal police officer who had attained permanent employee status, was discharged for cause and without a hearing. In ruling upon his claim that he had a property interest this Court relied upon the ordinance which had been authoritatively construed to permit discharges without a hearing. Accordingly, the court held that Bishop had no right to a hearing.

This rationale has also been applied in the area of the licensing of drivers. In *Bell v. Burson*, 402 U.S. 535 (1971), this Court held unconstitutional a Georgia statute which required the summary suspension of a driver's



license after the licensee was involved in a traffic accident unless he posted bond to cover damages. The Court said:

Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. [402 U.S. 539]

The City of Chicago has recognized that a cab driver has a continuing interest in his career and that this interest should be secure from termination except upon a demonstration that the licensee is unfit. This recognition is given expression in the municipal ordinance regulating cab drivers which provides that a licensee shall not suffer revocation of his license except after a hearing. *Supra* p. 4. In the instance of a driver charged with an offense such as the commission of a crime with a dangerous weapon the ordinance grants the incumbent licensee an opportunity to defend against the allegations. Also, and especially in a case where he has already been criminally convicted so that a challenge of guilt is foreclosed, he is granted an opportunity to persuade the licensing authority that his record nevertheless supports a finding of continuing fitness. In the language of *Roth, supra*, the ordinance creates in licensees an interest in their licenses which is secure from loss except through procedures established and defined by the ordinance.

Applicants, on the other hand, are granted no such assurance. Because they do not have a career at stake and have not been reliant upon taxi driving for their livelihood, the City Council has not found it appropriate to recognize in them any form of property interest. Accordingly, the municipal ordinance states that applicants who have been convicted of a crime involving

the use of a dangerous weapon are ineligible for a license and makes no provision for a contrary determination.

The Court of Appeal's equal protection decision rejects the distinctions based upon property rights recognized by *Roth, Perry*, and *Bell*. The conclusion of the Court of Appeals is that applicants must be given hearings simply because licensees are given hearings even though applicants lack the property interest upon which licensees' hearing rights are founded. The consequence of that rationale would be the virtual denial in both licensing and public employment contexts of the power to make procedural distinctions based upon the differing interests of the individuals involved.

There is a second factor which underlies the differing treatment accorded applicants and licensees. Licensees in the course of their employment establish a record by which their fitness can be judged. Thus a licensee who has demonstrated through his performance that he has not violated his responsibilities as a cab operator, even though subsequently convicted of an armed felony, might nevertheless be found fit to continue in his employment. Applicants, however, will not have created such a record. Consequently, if a hearing were conducted to determine the fitness of a convicted applicant the licensing authority would be compelled to rely upon dissimilar employment records, probation reports or psychological evaluations. Such evidence is inevitably less demonstrative of fitness for employment as a driver than evidence of actual conduct as a driver.

Nor is this policy premised merely upon administrative convenience. Rather, it is founded upon the greater reliability and probativeness of the evidence supplied by a performance record. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), reflects a similar

rationale. There, a uniformed state police officer was mandatorily retired at age 50. The Massachusetts statute embodied a presumption that officers attaining age 50 are no longer fit for such employment and provided no opportunity for such an officer to demonstrate continuing fitness. On the other hand, officers between the ages of 40 and 50 were given tests in order to make individualized determinations of fitness. This Court, in ruling against Murgia's assertion that the statute denied him equal protection, held that the mandatory retirement rule was rationally related to the statutory goal of insuring fitness in patrol officers. Although individualized testing of officers over 50 was not entirely unfeasible this Court held that the increased risk of physical disability in those over 50 and the difficulty in successfully determining fitness justified the mandatory retirement rule. The Court specifically noted testimony indicating "that evaluating the risk of cardiovascular failure in a given individual would require a number of detailed studies". (427 U.S. 307 at 311.)

Denial of an individualized determination because of difficulty in obtaining reliable evidence was similarly upheld against an equal protection attack in *Marshall v. United States*, 414 U.S. 417 (1974). In that case a narcotic addict with three felony convictions was denied rehabilitative commitment without an opportunity to demonstrate his suitability for such treatment. The controlling statute conclusively denied eligibility for any person with two or more prior felony convictions. This Court concluded in light of the medical and psychological uncertainties involved in predicting appropriate candidates for rehabilitation that Congress reasonably could conclusively exclude such individuals and that in so doing it denied neither due process nor equal protection.

This Court recently acknowledged the preferability of reliance upon objective facts such as convictions rather than individualized fact-finding in the area of determining fitness for a driver's license where individualized determinations would necessitate inquiry into such subjective factors as a driver's "disrespect" for traffic laws or "lack of ability to exercise ordinary care." *Dixon v. Love*, 45 U.S.L.W. 4447 (May 16, 1977) at 4450.

The Court of Appeals discounted the superior evidentiary qualities of a work record as a basis of distinction between licensees and applicants:

The validity of this distinction is dissipated, however, by the fact that a licensee has an opportunity to obtain a favorable exercise of this discretion regardless of how short a time the license has been held. [App. p. 20]

This conclusion suggests that had the ordinance denied a hearing to applicants and licensees with less than perhaps two or five years of work record it would conform to equal protection standards. But the drawing of such lines has been regarded by this Court as properly within legislative discretion. In *Marshall v. United States*, 414 U.S. 417 (1974), *supra*, it was stated:

The Court has frequently noted that legislative classifications need not be perfect or ideal. The line drawn by Congress at two felonies, for example, might, with as much soundness, have been drawn instead at one, but this was for legislative, not judicial choice. *McGinnis v. Royster*, 410 U.S. 263 (1973). [414 U.S. at 428.]

In this regard it should additionally be noted that the line drawn by the ordinance is not between those eligible for the license and those not eligible but rather between those entitled to a hearing and those denied a hearing. Thus although incumbent licensees may obtain a hearing after a conviction it must be supposed that the



licensing authority who hears the presentation of a licensee will attach little significance to a brief employment record in weighing it against the conviction. Consequently, such a short term licensee will gain little of substance as a result of his hearing opportunity.

For all of these reasons it is submitted that there are substantial differences between the situations of applicants and licensees which provide a rational justification for the procedurally different treatment afforded the two classes.

The Court of Appeals applied a rational basis test in its examination of the subject ordinance. Judge Campbell considered in some detail the appropriate equal protection standard to be applied (App. p. 28-33) and also concluded that, because no fundamental right was affected and because no suspect class was involved, the ordinance should be measured by the traditional rational basis standard. Petitioner, of course, agrees fully with these conclusions and submits that the equal protection standard laid down in *Dandridge v. Williams*, 397 U.S. 471 (1970) is applicable.

[T]he Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all . . . It is enough that the States' action be rationally based and free from invidious discrimination.

For the reasons discussed *supra* the subject ordinance meets this standard.

## II.

### THE ORDINANCE DOES NOT DENY DUE PROCESS.

The Court of Appeals, in rejecting the distinction based upon a property interest in licensees, appears to have concluded that a denial of equal protection resulted

simply because it believed that among the class of ex-offenders some received due process and others did not. The court stated:

Such distinctions among those members of the class of ex-offenders are irrational, regardless of the importance of the public safety considerations underlying the statute or the relevance of prior convictions to fitness. In fact, allowing existing licensees who commit felonies to continue to be eligible for licensing undercuts the reasonableness of the basis for the classification, which is that the felony is *per se* likely to create a serious risk which cannot be sufficiently evaluated to protect the public through individualized hearings. An applicant for a license who has committed one of the described felonies and a licensee who has done the same are similarly situated, and no justification exists for automatically disqualifying one and not the other. Accordingly, insofar as Ch. 28.1-3 and 28.1-10 discriminate irrationally among the class of ex-offenders, they violate the equal protection clause of the Fourteenth Amendment. [App. p. 21]

The ordinance provides that all ex-offenders are subject to denial of a license for an armed felony conviction. The ordinance differentiates among ex-offenders in that it affords some (licensees) an "individualized hearing" which it does not grant to others (applicants), who are "automatically disqualified." The Court of Appeals concludes, therefore, that the result is a denial of equal protection to applicants.

The rationale of the Court of Appeals is troublesome in several respects. First, denial of equal protection as a consequence of a denial of due process is a complex and apparently novel proposition. The Court of Appeals has not suggested any authority for this approach and petitioner's research similarly has disclosed none. Second, it appears to be a needlessly indirect analysis for if the applicant's due process rights were denied by the



refusal to provide him an individualized hearing then the Constitution would require that he be given the hearing regardless of whether a hearing is provided for incumbent licensees. Judge Campbell's concurring opinion (App. pp. 26-45) straightforwardly addresses this due process issue and reaches the conclusion that the applicant was denied due process because the ordinance embodies an irrebuttable presumption. And, indeed, certain of Judge Campbell's conclusions appear to have figured in the reasoning of the per curiam opinion. Consequently, although the opinion claims to eschew due process issues and speaks in equal protection terms any discussion of the opinion appears incomplete without reference to the underlying due process considerations. For the convenience of this Court Petitioner accordingly submits his views on the due process ramifications of the case.

In order to determine whether due process has been denied the due process interest at stake must be identified and the procedures affecting it analyzed to determine whether it has been adequately protected. As this Court declared in *Board of Regents v. Roth*, 408 U.S. 564 (1972), at 569, "the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property". It is apparent for reasons already discussed (*supra* pp. 10-13) that applicants, by definition, have no property interest in a license which they have never held and for which they have not previously qualified. Thus, if applicants have any due process interest at stake it must necessarily be a "liberty" interest.

In refusing an applicant a license for the reason of a previous conviction the City does not impose upon him any stigma. The conviction upon which the denial is premised is a public record and the action of the licensing authority can neither add to, nor subtract from, the

stigma attached to that conviction. Nor does the denial of a cab-operator's license restrict the mobility of the applicant for it does not affect his opportunity to drive a private vehicle. Indeed it does not even deny the applicant the opportunity to operate a taxi in any place other than the City of Chicago.

Thus, the interest at stake is nothing more than an opportunity to drive a taxi within the City of Chicago and the due process issue is whether the ordinance which deprives the applicant of that narrow and specific opportunity on the basis of a conviction for an armed felony is procedurally adequate.

In *Weinberger v. Salfi*, 422 U.S. 749 (1975), this Court upheld provisions of the Social Security Act which conclusively denied survivors benefits to widows who married the wage earner less than nine months prior to his death. The district court, declaring that the statute relied upon an irrebuttable presumption that marriages entered less than nine months prior to the wage earner's death were shams aimed only at the procurement of Social Security benefits, held the provision violative of due process. This Court, in reversing, observed that extension of the holdings of previous decisions into the area of social welfare legislation. "... would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." (422 U.S. 749, at 772) The Court, in declining to apply the irrebuttable presumption test which had been applied in previous decisions quoted (422 U.S. 749 at 773) from *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) at 489:

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition.

Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think.

Although the opinion in *Salfi* specifically dealt with welfare legislation its reasoning bears with no less force upon the licensing ordinance here in question. As was observed *supra* pp. 13-15, the conclusive bar against convicted applicants is not merely an administrative convenience but, more importantly, reflects the difficulties of reliably predicting the rehabilitation of convicted armed felons. Moreover, the interest at stake, the protection of vulnerable taxi passengers from drivers of violent disposition, is of a very high order. For these reasons it is submitted that the conclusion of *Salfi* should be controlling:

There is thus no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations out weigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce. [422 U.S. 749 at 785.]

However, even if the rationale of *Salfi* is not deemed applicable in the area of employment licensing and more rigorous standards are applied petitioner submits that the ordinance here before the court is not violative of due process.

In *DeVeau v. Braisted*, 363 U.S. 144 (1960), this Court upheld the constitutionality of the New York Waterfront Commission Act which among other things provided that "past convictions for certain felonies constitute specific disabilities for each occupation, with discretion in the Commission to lift the disability, except in the case of port watchmen, where it constitutes an absolute bar to waterfront employment." (363 U.S. 144, at 149.) This Court declared:

Duly mindful as we are of the promising record of rehabilitation by ex-felons, and of the emphasis on rehabilitation by modern penological efforts, it is not for this Court to substitute its judgment for that of Congress and the Legislatures of New York and New Jersey regarding the social surgery required by a situation as gangrenous as exposure of the New York waterfront had revealed.

Barring convicted felons from certain employment is a familiar legislative device to insure against corruption in specified vital areas. [363 U.S. 158-159].

The opinion enumerated a variety of employments and occupations from which criminally convicted offenders are barred. (363 U.S. 159). This Court found such statutory bars to result in no denial of Fourteenth Amendment due process rights.

The significance of *DeVeau* is perhaps best appreciated when that decision is contrasted with the decision in *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957). *Schwartz* was denied permission to take the New Mexico bar examination because of a history of Communist Party affiliation and labor movement arrests. This Court declared:

A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. [353 U.S. 238-239.]

The Court observed that although a state may require high standards of qualification such as good moral character ". . . any qualifications must have a rational connection with the applicant's fitness or capacity. . ." (353 U.S. 239). The Court also stated:

The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows



nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated. [353 U.S. 241]

Two critical defects thus were recognized in the considerations upon which the New Mexico bar examiners denied *Schware* entrance to the legal profession. First was the irrationality of an inference of unfitness from the facts relied upon; and second was the questionable fashion in which those facts had been established.

These criteria appear to underlie virtually all of the decisions which have invalidated statutory irrebuttable presumptions. The questionable nature in which the statutorily specified fact was determined certainly explains the decision in *Freitag v. Carter*, 489 F.2d 1377 (7th Cir. 1973), which the Court of Appeals cited (App. pp. 19-20) in its opinion in the instant case. Freitag, also an applicant for a cab operator's license, was denied the license without a hearing when Commissioner Carter's investigation disclosed that Freitag had once been confined in a state mental hospital. The ordinance required that an applicant be free of an "infirmity. . . of mind" in order to qualify. (489 F.2d 1377, 1379.) Although Freitag had been a patient in a mental institution there was no indication that he had at any time been either judicially or medically declared insane or mentally infirm. Accordingly, he had at no time had a procedural opportunity to establish a lack of mental infirmity. Moreover, the inference of unfitness based upon a previous mental illness was irrational in that it reflected "an archaic attitude in the field of mental health." (489 F.2d 1377, at 1380.)

In *Bell v. Burson*, 402 U.S. 535 (1971), on the other hand, the statutorily specified fact was not in question but the inference based upon it was illogical. There a

motorist's driving license was summarily suspended after he was involved in an accident and failed to post bond for damages. This Court held that the statute which presumed fault or liability, without any evidentiary hearing, violated the driver's due process rights. Clearly guilt or fault could not rationally be inferred from the mere fact of involvement in an accident.

Similarly, in *Stanley v. Illinois*, 405 U.S. 645 (1972), this Court held violative of due process an Illinois statute which irrebuttably presumed illegitimate fathers to be unfit parents. The Court clearly believed that unfitness could not be rationally inferred from the mere fact of unmarried paternity saying:

"[It may be that] . . . most unmarried fathers are unsuitable and neglectful parents. . . but all unmarried fathers are not in this category; some are wholly suited to have custody of their children." [404 U.S. 645, at 654.]

In *Vlandis v. Kline*, 412 U.S. 441 (1973), the Court held unconstitutional a Connecticut statute which irrebuttably presumed any unmarried student to be a non-resident if he had had a legal address outside the state for any part of the year preceding his application for admission. The Court found the presumption based on the provisions of the statute to be "so arbitrary as to constitute a denial of due process." (412 U.S. 441 at 450.) The Court cited numerous instances in which the presumption bore no rational relation either to intent to remain resident in Connecticut or to having had a long residential status in the state.

The results in *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973), and *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), are explicable on the same grounds. In *Murry* this Court found a denial of due process in a provision of



the Food Stamp Act which made ineligible for food stamp assistance any household "which includes a member who has reached his eighteenth birthday and who is claimed as a dependent child for Federal income tax purposes by a taxpayer who is not a member of an eligible household. . . during the tax period such dependency is claimed and for a period of one year after the expiration of such tax period." The Court acknowledged the propriety of the statute's purpose which was exclusion from participation in food stamp benefits of the unneedy, especially college students and the children of financially secure parents. But the Court concluded that a "deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives and rests on an irrebuttable presumption often contrary to fact." (413 U.S. 508 at 514).

In *Moreno* the Court invalidated a statutory exclusion from food stamp assistance of "any household containing an individual who is unrelated to any other member of the household." (413 U.S. 528 at 529.) The Court found the measure, which was purportedly intended to eliminate fraudulent participants from the food stamp program to be "wholly without any rational basis" and therefore invalid under the Due Process Clause of the Fifth Amendment. (413 U.S. 528 at 528.) The Court clearly believed, as the facts of the cases before it illustrated, that the presence of an unrelated individual in the same household did not rationally support an inference of any type of fraud.

And in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), and *Turner v. Department of Employment Security*, 423 U.S. 44 (1975) the Court held rules which irrebuttably presumed inability to work due to

pregnancy to be violative of due process. In both cases the Court noted that inability of a pregnant woman to work was highly individual and that it could not reasonably be inferred that a woman was incapable for any arbitrarily fixed period of time simply because she is pregnant.

Thus it can be seen that irrebuttable presumptions have failed to meet due process requirements where either or both of two factors appear. If the statutory presumption (e.g., unfitness to practice law) is not inevitably implied by the statutorily specified fact (such as previous unorthodox political affiliations) then the statutory presumption has been found irrational. Or, second, if the statutorily specified fact is itself established in a way which is so procedurally deficient as to render its truthfulness suspect then, also, the measure denies due process.

The ordinance here before the Court is subject to neither of these infirmities. The Court of Appeals has not found that the commission of an armed felony is not highly indicative of unfitness for the duties of a cab driver. As Judge Campbell's concurring opinion states:

There is also a rational basis for considering an applicant's prior criminal record in determining whether he is a person of good character, worthy of being entrusted with the responsibilities of a public chauffeur. The past conduct of an applicant may be the best indicator of his present character and his future actions. [App. p. 32.]

It could hardly be concluded that proof of specific criminal actions cannot be legislatively recognized as absolutely disqualifying for certain employments. See *DeVeau v. Braisted*, 363 U.S. 144 (1960), *supra* pp. 20-21.

Clearly also, the ordinance is not defective in relying upon criminal convictions as demonstrative of criminal acts. One who has been convicted in a criminal trial, unlike one who has merely been arrested, as in *Schware*, *supra*, cannot complain that the fact of his commission of the offense has been established in a procedural manner inconsistent with the Due Process Clause.

It may also be argued that the possible remoteness in time of the conviction from the application for the license undermines the validity of the conclusion of continuing unfitness and that some limitation on the period of unfitness stemming from a conviction should be fixed. However as was noted *supra*, p. 15 this Court has consistently held that fixing of such boundaries is properly a legislative function. See *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); *Marshall v. United States*, 414 U.S. 417 (1974), and *McGinnis v. Royster*, 410 U.S. 263 (1973). Whether the commission of an armed felony ceases to support an inference of unfitness after five years or ten years or persists indefinitely is necessarily a somewhat arbitrary decision. It would be no less arbitrary if decided by the courts.

As noted *supra* p. 18, the interest of a convicted applicant is narrow and consists solely of an opportunity to operate a taxi in the City of Chicago. The governmental interest at stake is the safety of taxi passengers who, having no ability to make an informed selection in their choice of drivers, must rely upon the City's licensing standards for their security. The City's ordinance discharges this responsibility by disqualifying those applicants whose disposition for violence has been established through a criminal trial. Even when measured against the strict standards of the irrebuttable presumption test no denial of due process results.

## CONCLUSION

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For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals, should be reversed and the judgment of the District Court should be affirmed.

Respectfully submitted,

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